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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

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NO. 163

DEENA PRODUCTS COMPANY,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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THE TWENTIETH CENTURY PRESS, INC., CHICAGO

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

NO. 794

DEENA PRODUCTS COMPANY,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

DEENA PRODUCTS COMPANY, Petitioner, prays that a writ of certiorari issue to review the Decree of the United States Court of Appeals for the Seventh Circuit entered April 29, 1952 (P. A. 171)[1]

OPINION BELOW

The opinion of the Court of Appeals for the Seventh Circuit (P.A. 153) is reported at 195 F. (2d) 330.

JURISDICTION

The opinion of the Court of Appeals for the Seventh Circuit was entered on March 18, 1952 (P. A. 153). A timely petition for rehearing was filed on April 2, 1952 (P. A. 170) and was denied on April 29, 1952 (P. A. 177). The Decree of the Court of Appeals for the Seventh Circuit was entered on April 29, 1952 (P. A. 171). The jurisdiction of this Court is invoked under Title 28 U. S. C. sec. 1254(1).

1. References to portions of the record printed by Deena Products Company, petitioner, are designated by "P.A." References to portions of the record printed by the National Labor Relations Board are designated "B.A." The numerals following such designations are references to the page numbers therein.

QUESTIONS PRESENTED

The National Labor Relations Board found that Petitioner, a floor and table lamp manufacturer, had discriminatorily laid off employees in two of its departments, the wire frame department and the art department, in violation of Sections 8(a)(1) and (3) of the National Labor Relations Act, as amended. These layoffs occurred during a period of union organizational activity. Uncontroverted evidence in the record established that even absent any union activity all of the frame department employees would have been laid off and there would have been a substantial reduction in the art department for economic reasons. As to the art department employees, as the Board itself found, the record furnished no basis for determining the order in which they might have been laid off or discharged absent any alleged unfair labor practices.[2] Notwithstanding, the Board and the Court of Appeals concluded that because of expressions indicating anti-union animus these layoffs were all discriminatory. The Court ordered that in determining reinstatement and back pay, the possibility and probability of the reduction in the number of employees for economic reasons should be taken into "consideration." Back pay was ordered to be computed on a quarterly basis.

The questions presented are:

1. Can an employee be found to have been discriminatorily discharged who would have been laid off in any event for economic reasons?

2. Can any employee be found to have been discriminatorily discharged where the record establishes that even absent any union activity a reduction in personnel would have been made for economic reasons, but furnishes no basis for determining which employees were laid off because of union activities and which

2. This is the finding of the Board itself (B. A. 79).

employees would have been laid off in any event, even absent any alleged discrimination?

3. May an order directing back pay and reinstatement be entered without a determination as to which employees are entitled to back pay and reinstatement?

4. Can an employer be found guilty of discriminatorily laying off employees who may not be entitled to back pay or reinstatement because they would have been laid off in any event for economic reasons, the determination of which is left to post-decree enforcement proceedings?

5. Is it sufficient for a general decree directing reinstatement and back pay to be entered shifting to Petitioner in post-decree compliance proceedings the burden of proving which employees are not entitled to reinstatement or back pay?

6. Is computation of the back pay award upon a quarterly basis, each quarter being independent of each other, proper in a seasonal business?

7. Is not the back pay award to provide that an employee show he made reasonable efforts to find other employment as a prerequisite to receiving back pay?

STATEMENT

Commencement of the Action

On April 12, 1950, pursuant to a charge filed by the United Service Employees Union, Local 329, of the Building Service Employees International Union, affiliated with the A. F. L. (B. A. 8, 9) the National Labor Relations Board issued a complaint against petitioner, Deena Products Company (B. A. 12, 17, 19).

The complaint, as amended, alleged in substance that Petitioner had on or about March 24, 1949, discriminatorily discharged and thereafter had refused to reinstate certain

employees in its frame or wire department and in its art department at 1130 South Wabash Avenue, Chicago, Illinois, and had interfered, restrained and coerced employees in their organizational rights by interrogating them, threatening them with reprisals and promising and granting wage increases (B. A. 12, 17, 19).

Petitioner answered the complaint, denying that it had engaged in any of the unfair labor practices charged (B. A. 20, 25).

Petitioner's Business Operations

Petitioner is engaged in the business of manufacturing and selling electric table lamps complete with lamp shades. Its factory is located at 1130 South Wabash Avenue, Chicago, Illinois, and its offices (including minor factory operations) are located at 825 South Wabash Avenue, Chicago, Illinois. Petitioner's lamps consist of a pottery base, produced by an affiliated company in Paducah, Kentucky, decorated with various colorful designs, and fitted with necessary electrical attachments, and a wire frame lampshade covered either with fabric or parchment (B. A. 206, 207).

Petitioner's business is seasonal. Because of the relatively bulky and fragile nature of its lamps, manufacturing for inventory is impracticable. Manufacturing is done against sales, petitioner's operations necessarily expanding and contracting with its sales (P. A. 71, 73). Its normal cycle of operations each year consists of (i) a slow period, from March to the middle of June, (ii) a gradual pickup in business from July to October, (iii) a peak period from October to January and (iv) a declining period from January to approximately March when its low period is again reached (P. A. 71-73, 143).

Petitioner followed a practice of laying off and hiring employees as needed in accordance with its seasonal cycle of operations (P. A. 74, 97, 143). These layoffs were always made without prior notice to personnel (P. A. 88).

Plans for Petitioner's New Plant

In 1946 Petitioner formulated plans to move and to concentrate most of its manufacturing operations in various Kentucky locations. Active steps were immediately taken to carry out the plans. The object of these plans was to enable Petitioner to manufacture lamps near the place where the pottery bases were made so as to avoid the necessity for making large shipments of fragile pottery bases from Kentucky to Chicago for assembly and further reshipment to purchasers of completed lamps after assembly (P. A. 76-77; 95-96). Petitioner's plan was to concentrate all its volume or mass production operations in Kentucky, to close down its minor operations at 825 South Wabash Avenue, Chicago, Illinois, and to remodel the plant at 1130 South Wabash Avenue, Chicago, Illinois, where its lamp manufacturing operations had been carried on, into a general office and sales headquarters, and to manufacture only certain higher priced specialty lamps there (P. A. 96).

In accordance with this plan new plants owned by subsidiaries or affiliates of Petitioner were established; one at Paducah, Kentucky, to manufacture pottery bases, and one at Wickliffe, Kentucky, to assemble and complete lamps (B. A. 92-93).

In 1947 plans were drawn up for an additional new plant in Kentucky and in 1948 a site for this plant was chosen in Arlington, Kentucky, and construction was begun (P. A. 1, 14). This new plant was specially designed for the efficient large scale production of lamps, and to give Petitioner advantages lacking in the Chicago plants, which had not been

specially designed for lamp manufacture (P. A. 75-76; 95-96). The Arlington plant was completed early in March, 1949. A plant manager, Louis Adams, was hired and from March 12, 1949, to March 20, 1949, received special training and instructions from Petitioner in Chicago (P. A. 14; 76-77). At this time applications for employment had been taken from persons in the Arlington area and a list of persons seeking employment had been compiled.

The plans for the new Arlington plant called for moving the Chicago wire department machinery to the new plant instead of purchasing new frame department machinery (P. A. 94-95). To a large extent, the machinery required for a frame wire department consists of specially designed and constructed machines which take over a year to manufacture and which are not ordinarily available in the used machinery market (P. A. 94).

Changes in Production Methods

In April, 1949, an affiliated company which manufactured pottery lamp bases for Petitioner perfected and began to use a new process by which desired colors and designs were baked directly into the pottery (P. A. 97, 101-109). This made it unnecessary to use the old method of decorating pottery, which consisted of successive processes of taping, spraying and wiping to achieve desired color combinations (P. A. 108-109), and also eliminated the need for a large number of personnel in Petitioner's art department (P. A. 97, 109).

The Departments Involved

In the period involved, March and April, 1949, just before the move to the Arlington, Kentucky plant, Petitioner's plant at 1130 South Wabash Avenue, Chicago, Illinois, consisted of various departments performing work incident to the manufacture and assembly of lamps (B. A.

233). Among these departments were the frame or wire department, in which 11 men were employed (B. A. 239-240) which made wire frames for lamp shades; and the art department consisting of 2 artists, 11 sprayers, 29 tapers and 20 wipers, which decorated the pottery lamp bases in various colors (B. A. 240).

The Disputed Layoffs

(a) **The Frame Department**

In the latter part of March, 1949, Petitioner was ready to move the frame department machinery to the new Arlington, Kentucky plant in accordance with its plans. The appropriate date for the move had not yet been fixed (P. A. 14-15). However, on the morning of March 24, 1949, at about 8:30 A. M. the manager of the Chicago frame department inspected the inventory of wire on hand and found that several necessary gauges of wire were in short supply so that production could not be continued as it had been (P. A. 113, 122). Petitioner then decided that this was an ideal time to move the frame department machinery to Kentucky. The new plant in Kentucky had just been completed. The making of frames is the first step in lamp manufacture and the new plant could not be operated until frame machinery had been installed. The manager of the new plant had been hired, his training had been completed, and he was ready to take over. The slow period in Petitioner's yearly cycle of operations was at hand. If the Arlington plant were to to be ready for operations when business began in the Fall, its frame department would have to be set up at once, since several months would be necessary to install the machinery and train the employees of the new plant (P. A. 14-15; 76-77). Accordingly, the employees of the frame department were laid off. The frame department machinery and equipment was dismantled and shipped to Arlington the next

day (P. A. 77, 147). The machinery was installed and put in place in Arlington during the summer of 1949 and by the Fall of 1949 the Arlington, Kentucky plant was in full operation (P. A. 127-128; 128-130).

In June, 1949, Petitioner, after being approached by Sher Brothers, a manufacturer of floor lamps and shades under a patented process, purchased their business to acquire the patent (P. A. 13). Petitioners operated Sher Brothers in Sher Brothers' Chicago plant for 6 months as a separate business. In January, 1950, Petitioner closed the Sher Brothers' plant and moved part of the Sher Brothers' frame department machinery to its 1130 South Wabash Avenue plant. Petitioner then once again began to manufacture wire frames at 1130 South Wabash Avenue, but this time under the Sher Brothers patented process with such machinery, and gave first choice of employment to the employees of its former frame department who had been laid off in March, 1949 (P. A. 90-94). The National Labor Relations Board found this offer was made in good faith (B. A. 79).

(b) **The Art Department Layoffs**

The principal work in Petitioner's art department during March and April, 1949, was to decorate and color the pottery lamp bases which came from Paducah, Kentucky.

In this decorating process "tapers" employed in the department covered portions of the pottery with tape, so that as the paint was sprayed on, the covered portions would remain unpainted. The paint was then applied by "sprayers" using spray guns. After the spraying, the tape was removed and undesired or fuzzy paint edges were wiped off by "wipers" who removed the tape and applied various chemical solvents and cleaners. This process would be repeated as many times as different colors were used (P. A. 100-109).

April, 1949 was the beginning of the slow season in the cycle of operations and the time when layoffs would normally be made in the entire plant. As part of the usual plant-wide contraction in personnel at this time, Petitioner laid off employees in some 10 other departments (B. A. 233). In addition, at this time, the affiliated company which manufactured Petitioner's pottery bases had perfected a new process of baking desired colors and designs directly into the pottery lamp bases, which made it unnecessary to use the old methods of successive taping, spraying and wiping and cut down the number of employees required in the art department (P. A. 108-109).

Forty art department employees were laid off in April, 1949. Thirty-three of these employees are the persons listed in Appendix A of the Decree of the Court of Appeals as discriminatorily laid off (P. A. 174).

Petitioner's usual policy in effectuating layoffs was to give consideration not only to seniority but also to ability, attendance and deportment as well (P. A. 116-117, 132). Seniority alone was never the sole factor. There is no claim that more persons were laid off than were required by the advent of the slow season and the change in process. The National Labor Relations Board conceded that the making of layoffs was proper because of the change in process and the advent of the slow season (B. A. 77). The sole issue as to the art department layoffs was whether Petitioner discriminated in selecting for layoff the 33 employees listed in Appendix A of the Decree.

The Board's Decision and Order

(a) The Frame Department

The Board concluded that all of the layoffs in the frame department were discriminatory. It stated that Petitioner's contention that Petitioner closed down its Chicago frame

department and shipped the frame department machinery to Arlington, Kentucky for economic reasons "is not persuasive" and that "no plausible reason was given for precipitously moving the frame department to the exclusion of the other departments" (B. A. 76). The Board further concluded that Petitioner was aware of the Union's organizing activities and knew that most of the frame department employees were union members.

However, the Board found that Petitioner made a bona fide effort to reinstate all frame department employees in January, 1950 (B. A. 79). While it ordered Petitioner to offer reinstatement to all former frame department employees, it ordered back pay only until January, 1950 (B. A. 79).

(b) The Art Department

The Board found the layoffs in the art department were made for economic reasons. However, it found that in selecting the employees to be laid off, Petitioner utilized the economic layoff to rid itself of "certain union members" (B. A. 77).

The Board stated, however:

> "It is possible that some of the employees discriminated against might have been affected in the reduction of operations even absent the Respondent's unfair labor practice, but the record furnishes no basis for determining the order in which they might have been laid off or discharged" (B. A. 79).

The Labor Board, however, ordered reinstatement for all 33 art department employees listed in Appendix A of the Decree (P. A. 174), but as to back pay stated (B. A. 80-81):

> "As it is possible, however, that one or more of these employees named in Appendix A might have been laid off in the reduction of the work force, even if the [Peti-

had been on a non-discriminatory
y will be taken into consideration
amounts of back pay due to these

tioner's] selection had b
basis, this possibility wil
in determining the amou
employees . . . ."

Decree

The Court's Opinion and Decreaction of the Labor Board with

The Court affirmed the acti he Board's proposed Order (P. A.
certain modifications in the B
160). It stated:

alified order to offer full and imme-
o the extent that it has not already
nt with the proposed remedy that
ack pay be considered in the light
reduction in the number of em-
e reasons absent the unfair labor

> "We think the unqualified diate reinstatement to the done so is inconsistent wi reinstatement and back p of the possibility of redu ployees for economic rea practices."

the record

It also stated that on the r le and probable that a reduction in

> "it is equally possible and the frame department w shortly after the precipita . . . We think, therefore, th be permitted of the Appen ment) as that proposed art department)" (P. A.

nt would have taken place very
cipitate closing of the department
re, that the same treatment should
Appendix B list (the frame depart-
osed for the Appendix A list (the
P. A. 160-161).

P. A. 171-173) was in purported

The Decree entered (P. A rt's decision.
compliance with the Court's d

REASONS FOR GRA GRANTING THE WRIT

e in this case is whether the Labor

1. The principal issue in th rden of proof by shifting to Peti-
Board may evade its burden ublishing in post-decree compliance
tioner the burden of establishi cts which the Labor Board must
proceedings the very facts w may enter any order. This issue
itself establish before it may ance in the administration of the
is of paramount importance i s Act.
National Labor Relations Act.

The art department layoffs raise the question of which, if any, of the 40 employees actually laid off in April, 1949, were unlawfully discriminated against because of their union activities. There is no evidence that less than 40 art department employees would have been laid off in April, 1949 were there no union activities. It is undisputed that April, 1949, marked the advent of Petitioner's slow season and coincided with a permanent change in the process of coloring pottery lamp bases which enabled a reduction to be made in the art department. The Board's claim is that although the layoffs were economically justified the selection of employees for layoffs was discriminatory.[3]

On the basis of strict seniority, or on any other basis for that matter, it would have been impossible to have selected 40 art department employees for layoffs in April, 1949, without including therein some of the 33 employees listed in Appendix A to the Decree (P. A. 174).[4]

In order to have a proper basis for any reinstatement or back-pay award there should first be a finding by the Board as to which of the 33 employees listed in such Appendix A were discriminatorily selected for layoff. No such finding was made and on this record no such finding could be made.

The Board and the Court of Appeals recognized the "possibility" that some of the 40 employees laid off in the

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3. The Board found the layoffs were justified for the economic reasons given above (B. A. 77). It concluded, however, that in "selecting the employees to be laid off, Petitioner had utilized the economic layoff to rid itself of certain union members." (B. A. 77). The issue, as posed, is not whether a 40 employee contraction was justified but whether the selection of employees to make up the 40 laid off was discriminatory.

4. Appendix A at pps. 24-25, *infra*, shows that 26 of the 33 Appendix A employees would have been laid off in any event had Petitioner followed a policy of strict seniority alone in choosing employees for layoff.

art department would have been laid off for economic reasons even absent union activities (B. A. 79; P. A. 160). The Board, however, confessed its inability to determine who these employees were (B. A. 79). The Decree as entered herein merely provided that this "possibility" was to be taken into account in determining back pay (P. A. 172-173; B. A. 80-81). This places upon Petitioner the burden of disproving a matter which it is the burden of the Board to prove.

The National Labor Relations Act, as amended, clearly places upon the Board the burden of proving that the discharge or layoff of any employee was discriminatory and that such discharge or layoff was caused by union activities.[5] On the record in this case it is undisputable that some of the 33 art department employees listed in Appendix A to the Decree would have been laid off for economic reasons, in any event, whatever basis of selection for layoffs Petitioner might have used. Accordingly, it cannot be said that *all* of the 33 employees listed in Appendix A of the Decree were discriminatorily selected for layoff "because of" their union activities; the record furnishes absolutely no basis for determining specifically which of these 33 were discriminatorily selected for layoff "because of"

5. The National Labor Relations Act, as amended, does not preclude the layoff or discharge of an employee for any reason other than union activities. *Associated Press.* v. *N. L. R. B.* 301 U. S. 103, 132. An employer may discharge or lay off employees for any cause or any basis, as for no cause at all, as long as it is not for union activities. *N. L. R. B.* v. *Russell Mfg. Co.*, 191 F. (2d) 358, 359 (C. A. 5); *N. L. R. B.* v. *Tennessee Coach Co.*, 191 F. (2d) 546, 550 (C. A. 6). The burden of proving that the layoff of any employee was because of union activities rests clearly with the Board. *Interlake Iron Corp.* v. *N. L. R. B.* 131 F. (2d) 129 (C. A. 7). *N. L. R. B.* v. *Reynolds International Pen*, 162 F. (2d) 680, 690 (C.A. 7); *N. L. R. B.* v. *Goodyear Footwear Corp.*, 186 F. (2d) 913, 917 (C. A. 7).

union activities; and it cannot therefore be said that any one of these persons was discriminatorily laid off.[6]

Upon the basis of the Court of Appeal's own formulation of the issues, an essentially identical problem arises with respect to the frame department layoffs. The Court of Appeals conceded that the record established that in any event there would have been a reduction in the frame department because of economic reasons (P. A. 160). The opinion required that frame department employees be treated similarly to art department employees and that the "possibility" and "probability" of reduction in personnel be taken into consideration in ordering reinstatement and back pay (P. A. 160-161). Whatever the basis of selection for layoffs in the frame department Petitioner might have used some of the Appendix B employees would have been laid off. Accordingly, not all of the employees laid off were laid off discriminatorily. The record furnishes no guide for determining who these persons were, and it cannot therefore be said that any one of them was discriminatorily laid off.

The effect of the blanket Decree of the Court of Appeals is to shift to Petitioner in post-decree compliance proceed-

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6. In order to find that the layoff of any employee was discriminatory the Board must find that such layoffs occurred "because of" and would not have occurred "but for" union activities. If the same result would necessarily have followed in the absence of union activities, the employee's layoff cannot be said to have occurred "because of" union activities. *Russmann Mfg. Co.* v. *N. L. R. B.*, 111 F. (2d) 783, 787 (C. A. 8); *N. L. R. B.* v. *Goodwear Footwear Corp.*, 186 F. (2d) 913, 918 (C. A. 7). The Board has previously adhered to this same rule. *Matter of Acme Air Appliance Co., Inc.*, 10 N. L. R. B. 1385, 1403; *Matter of American Oil Co.*, 41 N. L. R. B. 1105, 1111; *Matter of Fiss Corp.*, 43 N. L. R. B. 125, 139. The facts in this case cannot support the conclusion that all 33 of the Appendix A employees were laid off "because of" union activities and would not have occurred "but for" union activities. Some of them would clearly have been laid off in any event. The record, however, does not establish who these employees are.

ings the burden of establishing its non-liability for back pay to specific employees. It requires Petitioner, therefore, to establish in post-decree proceedings the fact of which employees were discharged "because of" union activities and which employees would have been laid off in any event. These are matters which the National Labor Relations Act specifically requires the Board to establish initially as the very basis of any order which may be entered.

This case differs from those cases holding that ministerial administrative matters, such as the amount of back pay due to specific employees and the number of available vacancies for reinstatement purposes, may be left to post-decree compliance proceedings. E. g., *N. L. R. B.* v. *Bird Machine Co.*, 174 F. (2d) 404, 405-406 (C. A. 1); *Home Beneficial Life Ins. Co.* v. *N. L. R. B.*, 172 F. (2d) 62, 63 (C. A. 4). The vice of the present Decree is that it states, in effect, that back pay need not be awarded to those employees who would have been laid off in any event, even absent union activities, and need be paid only to employees who were discriminatorily discharged, and leaves such questions to be established by Petitioner. The Decree, therefore, leaves to post-decree compliance proceedings a determination of the specific employees who were discriminatorily discharged. These are the very facts which the Board is required to establish as the foundation of an enforcement order. Petitioner, in any post-decree compliance proceedings would apparently have the burden of establishing that any particular employee was not discriminatorily selected for layoff "because of" union activities and hence not entitled to back pay. Under such a general decree the Court has allowed the Board to evade its burden of proof and has, in addition, permitted the Board to shift that burden to Petitioner. A general decree in such circumstances is clearly inappropriate. Cf. *F. T. C.* v. *Morton Salt Co.*, 334 U. S. 37, 54.

The blanket Decree entered herein is thus improper, first, in expressly ordering reinstatement and back pay for employees not specifically found by the Board to have been discriminatorily laid off "because of" their union activities; and, second, in shifting to Petitioner the burden of establishing the very facts which the Board must itself establish, by a preponderance of the testimony, before any order may be entered.

2. The Court of Appeals has misconceived its duties under *Universal Camera Corp.* v. *N. L. R. B.*, 340 U. S. 474 and under Section 10(e) of the National Labor Relations Act. In the *Universal Camera Case*, this Court held at pages 487-488:

> "Whether or not it was ever permissible for Courts to determine the substantiality of evidence supporting a Labor Board decision merely on the basis of evidence which in and of itself justified it, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn, the new legislation definitely precludes such a theory of review and bars its practice. The substantiality of evidence must take into account whatever in the record fairly detracts from its weight."

Section 10 (e) of the National Labor Relations Act, as amended, provides the additional requirement that the Labor Board issue its orders "upon the preponderance of the testimony taken." The reviewing court is, therefore, also faced with the duty of determining, as a matter of law, whether this requirement has been met.[7]

Nevertheless the Court of Appeals here stated (P. A. 158-159):

> ". . . were we to reject the Board's findings from the conflicting evidence it would have to be on the basis

7. 29 U. S. C. sec. 160(e). Conference Report, Rep. No. 510, H. R., 80th Cong., 1st Sess., p. 56.

> of accepting all the Deena evidence and disregarding that of the Board. We need cite no authority for the proposition that it is not our function to weigh the evidence, and where there is substantial evidence in support of the findings on the record considered as a whole, and including all inferences fairly drawn from that evidence, we must accept such findings."

The requirement that the Labor Board issue its order on the "preponderance of the testimony taken" and that its findings when made must be supported by substantial evidence on the whole record, makes clear that the reviewing court is not required to disregard the Board's evidence and accept all of the Petitioner's evidence as a prerequisite to refusing enforcement. Neither is the Court of Appeals required to accept all of the Board's evidence and disregard all of the contrary evidence. The substantiality of the evidence supporting the Board's findings must take into account "whatever in the record fairly detracts from its weight."[8] The Court of Appeals must determine whether the Petitioner's evidence deprives the Board's evidence of persuasive if not logical substance; and must further determine from the "whole record" whether the evidence supporting the Board's findings is substantial. In addition, the "preponderance of the testimony" test requires the reviewing court to determine whether the Labor Board has judicially appraised the evidence and has not concentrated on certain elements of proof to the exclusion of others.

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8. Professor Jaffe, in "Judicial Review: 'Substantial Evidence on the Whole Record,'" 64 Harv. L. Rev. 1233, 1240 (1950) states:

"If the record is to be searched simply for evidence which logically supports a finding, the presence of contradictory evidence is immaterial. But if the substantiality of evidence is to be determined in the light of the whole record, it becomes difficult to maintain that contradiction is immaterial unless of irrefutable character. Evidence from a questionable or interested source might not 'carry its own death wound,' but surely cases may be imagined where the countervailing testimony, though not carrying 'irrefutable truth,' may nevertheless rob the affirmative evidence of persuasive if not logical substance."

The opinion of the Court of Appeals plainly indicates that it failed to follow these requirements.

The Frame Department

Petitioner's evidence, entirely and wholly uncontradicted, was that it planned to establish a plant in Kentucky for the efficient mass production of lamps. The evidence showed the actual construction of the Kentucky plant; its design to accommodate the Chicago frame department machinery; the completion of such plant in March, 1949; and the actual moving of the Chicago frame department machinery to Kentucky in accordance with such plans.

In spite of this uncontradicted evidence the Board brushed it aside as "not persuasive" (B. A. 76). The Court of Appeals found the frame department layoffs were discriminatory by "piecing together" certain indicia of anti-union animus and other factors (P. A. 159).[9]

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9. The Court's conclusion that on March 24, 1949, Petitioner's president moved only a single department but was "not yet ready to move the entire plant" (P. A. 159) is a nonsequitur which is not supported by anything in the record. The evidence was uncontradicted that only the frame department was intended to be moved. The other departments were to be retained to do specialty work on a reduced basis. This is uncontradicted. The Court's conclusion that discrimination was proved because of the necessity for going outside to purchase frames for use in its other regular operations (P. A. 159) is similarly not based upon a sound conclusion to be drawn from the evidence. Of necessity, after the machinery was shipped to Kentucky, and before it was actually set up there in the Fall of 1949, no frames could be manufactured in any of Petitioner's plants. Purchases of frames during the interim transfer period establishes nothing. The pertinent fact is that the move to Kentucky had long been planned; the Chicago frame machinery was actually shipped there; and is now actually operating and producing frames. The opinion clearly discloses that the Court of Appeals based its conclusion upon the Board's evidence of Petitioner's anti-union animus and inferred therefrom that the discontinuance of the frame department must therefore have been motivated by illegal purposes (P. A. 159). However, the fact that in January, 1950, when Petitioner first began operating the former Sher Brothers frame department at its plant, Petitioner made a bona fide offer of reinstatement to its former frame department employees, negatives any conclusion that the layoffs were illegal.

The record remains clear that even absent union activities, the frame department would still have been moved to Kentucky and the Chicago employees would still have been laid off. There was no question that the frame department would be moved; the only question was when, within a matter of days, it would be moved. The evidence does not establish that, absent union activities, no move would have been made at all.[10]

The Court's opinion clearly discloses that the Court based its conclusion on the fact that because of certain expressions of anti-union animus, Petitioner must necessarily have discriminatorily laid off all frame department employees (P. A. 159). However, the evidence of anti-union animus, even if entirely credited, when considered together with evidence of Petitioner's long-planned move of the department to Kentucky, shows at best that on March 24, 1949, the layoffs might have been motivated by one of two reasons, one of which was legal and the other illegal. Evidence consistent with two hypotheses establishes neither. *Bussmann Mfg. Co.* v. *N. L. R. B.*, 111 F. (2d) 783, 787 (C. A. 8). The contention to the opposite in *N. L. R. B.* v. *Nevada Consolidated Copper Corp.*, 316 U. S. 105, 106, was expressly disapproved in the Conference Report accompanying the

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10. Thus in *Matter of Acme Air Appliance Co., Inc.*, 10 N. L. R. B. 1385, 1403 the Board determined that a decision to discontinue a certain department while made during a strike, was nevertheless motivated by a desire to effect a saving of $4,000 per year. Since the Board could not find that the company would have acted otherwise had the strike not intervened, it concluded that the discontinuance of the department was not discriminatory. See also: *N. L. R. B.* v. *Union Pacific Stages, Inc.*, 99 F. (2d) 153, 160 (C. A. 9); *N. L. R. B.* v. *Lion Shoe Co.*, 97 F. (2d) 448 (C. A.1); *N. L. R. B.* v. *Goodyear Footwear Corp.*, 186 F. (2d) 913, 918 (C. A. 7); *Matter of American Oil Co.*, 41 N. L. R. B. 1105, 1111; *Matter of Fiss Corp.*, 43 N. L. R. B. 125, 139.

Taft-Hartley Act amendments. Rep. No. 510, H. R., 80th Cong., 1st Sess. p. 56.[11]

The Court's conclusion could not have been reached without completely ignoring and completely disregarding Petitioner's uncontroverted economic evidence. The Board's findings to the contrary are not supported by substantial evidence on the whole record. The entire record plainly and fully establishes that the frame department layoffs would have occurred, in any event, whether or not there were union activities at Petitioner's plant.

The Art Department

There was uncontroverted evidence in the record that April, 1949, marked the advent of Petitioner's slack season when layoffs would normally be made and coincided with a permanent change in the process of coloring the pottery lamp bases, necessitating a decrease in personnel in the art department. It was further undisputed that Petitioner had never had a policy of strict seniority in effectuating layoffs, but that such layoffs were made on the basis of a combination of seniority, ability, attendance and deportment (P. A. 116-117, 132). There is no dispute that if Petitioner had followed a policy of strict seniority 26 of the 33 employees named in Appendix A to the Decree as having been discriminatorily laid off would have been laid off in any event, even had there been no union activities at Petitioner's plant.[12] As to the remaining 7 employees, Petitioner's evidence as to the consideration given in such cases to ability, attendance and deportment was not disputed (P. A. 132-137).

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11. The Conference Report stated:
"It is believed that the provisions of the conference agreement relating to the court's reviewing power will be adequate to preclude such decisions as those in *N. L. R. B.* v. *Nevada Consol. Copper Corp.* (316 U. S. 105) . . . . without unduly burdening the courts."

12. See Appendix A at pps. 24-25, *infra.*

The Board's evidence, even if entirely believed, shows at the most that Petitioner may have violated sec. 8(a)(1) of the National Labor Relations Act, as amended by general interference with union organizational activities. The finding that all art department employees were discriminatorily laid off clearly rests only and solely upon an inference that because the Board believed Petitioner was guilty of such interference, Petitioner must necessarily have unlawfully laid off all 33 of the art department employees listed in Appendix A of the Decree. The Board, however, expressly admitted its inability to determine which of the 33 named art department employees were improperly laid off (B. A. 79). The Court held only that Petitioner "utilized the economic layoff to rid itself of *certain* union members" (P. A. 159).[13] No finding was made as to which or even how many of the 33 employees in Appendix A to the Decree, if any, were discriminatorily selected for layoffs. No such finding could have been made in this record.

The Board therefore patently failed to sustain its burden of proof. It did not establish which employees, if any, were discriminatorily selected for layoff on a preponderance of the testimony taken. The findings of the Labor Board that *all* 33 of named employees were discriminatorily selected for layoffs, in view of Petitioner's uncontroverted evidence of economic reasons for the layoffs and its basis of selection, together with the fact that some of the named employees would have been laid off whatever basis of selection Petitioner had used, are clearly not supported by substantial evidence on the whole record.

In order for the Court of Appeals to refuse to enforce the Board's order, it was clearly not necessary for it to accept "all the Deena evidence" and to disregard that of the Board. Neither may the Court of Appeals accept all of

13. The Board found that Petitioner laid off "every union member in the art department" (B. A. 77). The Board's own evidence showed that four union members were retained by Petitioner (B. A. 196-198). There may have been more.

the Board's evidence and completely disregard that of the Petitioner. The opinion clearly discloses that the Court of Appeals plainly did not follow the requirements of the *Universal Camera Case.*

3. The Decree entered herein by the Court of Appeals is violative of law in other respects as well, raising important questions in the administration of the National Labor Relations Act.

(a) Paragraph 2(a) of the Decree goes far beyond the scope of the court's opinion. The Decree, in terms, orders reinstatement or placement on a preferential list for all employees named in Appendices "A" and "B" thereto (P. A. 172). The Court's opinion, to the contrary, recognized that *both* "reinstatement and back pay be considered in the light of a possibility of reduction in the number of employees for economic reasons absent the unfair labor practices" (P. A. 160).

The Decree also, in terms, requires Petitioner to repeat an offer of reinstatement to frame department employees (Appendix B list) despite the fact that the Board had itself found that Petitioner made a *bona fide* offer of reinstatement to all frame department employees in January, 1950 (B. A. 79; P. A. 172).

Clearly the Decree should order reinstatement or placement on a preferential list only for those art department employees laid off who would not have been laid off for economic reasons absent union activities (P. A. 164; 167).

(b) Paragraph 2(b) of the Decree (P. A. 173) should specifically require back pay only for those employees laid off who would not have been laid off for economic reasons, absent union activities and only for such period as such discrimination, if any, persisted. It is undeniable that there would have been subsequent seasonal or other layoffs for economic reasons even

for specific employees found on a particular date to have been discriminatorily selected for layoffs. (See P. A. 165, 168.) Such a requirement would conform to the Court's opinion "that reinstatement and back pay be considered in the light of a possibility of reduction in the number of employees for economic reasons absent the unfair labor practices" (P. A. 160). It would, furthermore, specifically negative any supposition that the burden of proving which employees were laid off "because of" union activities had shifted to Petitioner.

(c) Paragraph 2(b) of the Decree (P. A. 173) requires that back pay be computed on a quarterly basis, and that each quarter be independent of each other for purposes of computation. Such a method of computation is clearly discriminatory when applied to a seasonal business. Since excess earnings by the employee in one quarter do not operate to affect deficiencies in earnings in another quarter, the employee could receive more in back pay, computed on that basis, than he would have earned in employment at Petitioner's plant, giving effect to the seasonal nature of such employment. The quarterly method of determining back pay is in conflict with the holding in *N. L. R. B.* v. *Seven-Up Bottling Co.*, ... F. (2d) ..., (C. A. 5) (CCH, vol. 6, ¶66919).

(d) Paragraph 2(b) of the Decree is erroneous in that it makes no provision that the employee establish his or her reasonable efforts to find other employment during any period he is entitled to back pay. In a period of full employment, indolence should not be rewarded.

CONCLUSION

For the foregoing reasons it is requested that this petition for a writ of certiorari be granted.

Respectfully submitted,

SIDNEY R. ZATZ,

CARL H. URIST,

HENRY J. SHAMES,

Counsel for Petitioner.

APPEN APPENDIX A

ANALYSIS OF ART DE ART DEPARTMENT LAYOFFS

Based Upon General Counsel Counsel's Exhibit 3; B. A. 240-243

Employees in Order of Seniority	Laid Off April, 1949	aid Off ril, 1949	Would Have Been Laid Off if Strict Seniority Were the Only Factor	Named in Appendix A of Decree	Possible Deviations Among Those Named in Decree
SPRAYERS:					
Daisy Haire					
Corrine Toliver					
Willean Otis	X	X		X	X
Carolyn Bowman	X	X		X	X
Clare Parker	X	X	X	X	
Leora Cummings	X	X	X	X	
Lymustine Reece	X	X	X	X	
Anna Kulpin			X		
Mary Hinton	X	X	X	X	
Catherine Drye	X	X	X	X	
Ceola Smith			X		
TAPERS:					
Pressley Rodman					
Willie Thomas	X	X		X	X
Elizabeth Connor	X	X		X	X
Jesteen Tiggs					
Annie Birl					
Esther Dunbar					
Julia Hames					
Lerlene Hunt					
Ida Williams					
Connie Pratt					
Joycie Miggins	X				
Savannah Brown	X	X			
Willa Connor	X	X	X	X	
Bennie Valentine	X	X	X	X	
Mattie Moore	X	X	X	X	
		X	X	X	

APPENDIX A—(Continued)

Employees in Order of Seniority	Laid Off April, 1949	Would Have Been Laid Off if Strict Seniority Were the Only Factor	Named in Appendix A of Decree	Possible Deviations Among Those Named in Decree
Georgia Moore	x	x	x	
Alberta Battle	x	x		
Lillie Barnes	x	x		
Amy Hunter	x	x	x	
Sarah Ingrim	x	x		
Laura Jones	x	x	x	
Amanda McLemore	x	x	x	
Ethel Overton	x	x	x	
Vassie Johnson	x	x		
Bertha Butler		x		
Addie Weathers	x	x	x	
Nellie Jackson		x		
Ruthalia Gray	x	x	x	
Lola Lopez		x		
WIPERS:				
Minnie Wilson				
Lennie Thomas	x		x	x
Sovola Ingram	x		x	x
Margaret Walker	x		x	x
Alberta Sims				
Nommie Monroe	x	x	x	
Zelma Ellis		x		
Leonor Cotton	x	x	x	
Julia Hopkins	x	x	x	
Evelyn Jackson	x	x	x	
Pauline Newby	x	x	x	
Zelean Campbell		x		
Mary Herron	x	x	x	
Hazel Durant		x		
Carolyn Waller	x	x	x	
Tee A. Hobson	x	x		
Carrie Cowper	x	x	x	
Marietta Harris	x	x	x	
Estella White	x	x		
Catherine Clark	x	x	x	

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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 163

DEENA PRODUCTS COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (P.A. 153-161) [1] is reported at 195 F. 2d 330. The findings of fact, conclusions of law and order of the Board (B. A. 74-86), are reported in 93 NLRB 549.

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[1] As in the petition, references to portions of the record printed by petitioner, including the proceedings in the court below, are designated "P.A."; references to portions printed by the Board are designated "B.A." Where in a series of references a semicolon appears, references preceding the semicolon are to the Board's findings; those following are to the supporting evidence.

JURISDICTION

The judgment of the court below was entered on March 18, 1952 (P. A. 161). A petition for rehearing was denied on April 29, 1952 (P. A. 177). The petition for a writ of certiorari was filed on June 27, 1952. The jurisdiction of this Court is invoked under 28 U. S. C. 1254, and under Section 10(e) of the National Labor Relations Act, as amended.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. IV, 151, *et seq.*), are set forth in Appendix B, *infra,* pp. 18-20.

QUESTIONS PRESENTED

1. Petitioner, for anti-union reasons, closed down its frame department and laid off a number of union adherents in the art department, thereby violating Section 8(a)(1) and (3) of the Act. The court below directed the Board, in computing back pay, to take into account the possibility that some of the discriminatorily discharged employees in the frame department would have been laid off for economic reasons at a later date, and that some of the union adherents in the art department, who were selected for lay off by application of a discriminatory standard, would have been laid off even if there had been no discrimination. The principal question presented is whether identification of the particular employees who might have been laid off if discrimination had not occurred was indispensable to a finding that discrimination had occurred.

2. Whether the Board's findings of discrimina-

tion are supported by substantial evidence on the record considered as a whole.

3. Whether the decree entered by the court below is invalid because it requires petitioner to place on a preferential hiring list discriminatorily laid off employees who might have been laid off even if they had not been selected discriminatorily and because it fails to specify—

> (a) that back pay thereunder does not accrue during periods when the employee would have been unemployed for economic reasons; (b) that employees named therein must prove that they did not wilfully incur losses.[2]

STATEMENT

I. The Board's Findings and Conclusion

Following the usual proceedings under Section 10 of the Act, the Board found that petitioner violated Section 8(a)(1) of the Act by interrogating its employees concerning their union activity, by threatening its employees with reprisals if they engaged in union activity, and by promising and granting a wage increase for the purpose of discouraging union membership and activity. The Board further found that petitioner violated Section 8(a)(3) and (1) of the Act by laying off Louis Lacy, Maggie Mitchell, and all its frame depart-

[2] Petitioner's attack upon the order for prescribing the quarterly formula in computing back pay does not present a question for review here, since petitioner failed to challenge this formula before the Board or before the court below. See pp. 12, 13, 17, *infra*. Petitioner's claim that the decree requires petitioner to offer reinstatement to employees whom it has already offered to reinstate is refuted by the plain language of the decree (P. A. 172).

ment employees for their membership in and activities on behalf of the union and by discriminating on the basis of union membership in the selection of art department employees for layoff. Since petitioner now challenges the Board's findings, and the decree of the court below, only in so far as they concern the frame and art departments, the following statement will be limited to the subsidiary facts with respect thereto upon which the Board's findings rest.

A. Background of the layoffs in the frame and art departments

On or about February 24, 1949, the Union[3] started its organizational drive among petitioner's employees (B. A. 74; 192, 198). One of the first employees approached by union organizer Deans was Otis Noble, an employee in petitioner's frame department (B. A. 33; 124, 192-193, 270). Noble not only signed a union application card himself, but distributed cards to other employees and solicited their membership in the Union (B. A. 33; 124-125, 126, 148, 151, 167, 193, 270). On or about March 14, when the combined efforts of Noble and Deans had resulted in the organization of the frame department employees and of a number of other employees, principally in the art department, Noble was approached by Irving Taradash, an executive of petitioner, who told Noble that he had heard

[3] United Service Employees Union, Local 329, of the Building Service Employees International Union, affiliated with the A.F.L. (B. A. 191).

about the union activity, that he considered Noble a nice fellow, but if Noble wanted to keep his job he would be well advised "not to cooperate with the union" (B. A. 33, 74; 103, 125, 155, 192-193, 233-242, 255-300). On the morning of March 24, union organizers Deans and Lens were at petitioner's plant passing out handbills as the employees entered to go to work (B. A. 33-34, 77; 193-194). While thus engaged they were approached by Plant Superintendent Weiss, who told Deans, "We know who is in the Union and they will get theirs" (*ibid.*). As described *infra*, pp. 8-9, it was later the same morning that the employees in the frame department, where the Union's campaign had been most successful, were suddenly laid off.

During the Union's organizational period, Lois Scholl, supervisor of petitioner's art department, engaged in extensive interrogation and threatening of the employees. On one occasion, in March 1949, Supervisor Scholl went to each work table in the art department and questioned the employees individually and in groups as to whether or not they had been approached by the Union, had signed union cards, or knew who was responsible for starting the union activity (B. A. 34, 75, 77; 117, 128-129, 136, 138, 139-140, 141-142, 161, 177, 180-181, 189-190, 201). Coupled with this interrogation, Scholl warned that the employees were not to join the Union, that the employees responsible for "trying to start a union" would "find themselves right out the front door," and that "before Mr. Weiner [petitioner's president] would see a union

in the building, he would close the place down" (B. A. 34, 75, 77; 117, 138, 161, 170, 200-201).

On the morning of March 24, Scholl approached one of the work tables and, after interrogating Amy Hunter and her fellow employees about the Union advised them that "if anyone signs any cards and we know it, they are going out the damned front door" (B. A. 49-50, 77; 121). Another group was told that "somebody in the wire department [4] had joined the union and they was on their way out" (B. A. 49-50, 77; 117).

Immediately after the frame department employees had been dismissed (see *infra*, pp. 8-9), Scholl approached employee Hunter and asked, "Amy, are you bringing that old nasty union in here?" (B. A. 49-50, 77; 121). When Hunter replied "No," Scholl pressed her for information as to the identity of those responsible and added that "the men in the wire department were shipped out the front door because of the union. Mr. Weiner will not have any union in here" (B. A. 49-50, 77; 121-122). Supervisor Scholl also approached employee Parker, who had admitted talking to the union organizer, saying, "You see what happened to those fellows downstairs in the frame department. * * * They all get fired, and the same thing will happen to you girls. * * * Mr. Weiner says he is not going to have a union, and he will close the damn joint down before he'd have a union" (B.A.

[4] The "wire frame department" was usually referred to as the "frame department" but occasionally as the "wire department."

34-35, 77; 190). Employee Hattie Moore and the other employees at her work table were similarly advised by Scholl that President Weiner would not tolerate unionization and that if they did join they would "be just like the wire boys. You will go out the damned front door" (B. A. 50, 77, 129).

On numerous other occasions, Scholl interrogated groups and individuals relative to their union affiliation or activity, accused them of lying when they denied participation, told them not to bring union pamphlets into the plant, warned that unionization would mean less income for them, and repeated the threat that unionization would mean discharge or, if necessary, the shutdown of the entire plant (B. A. 34-36, 49-50, 75, 77; 139-140, 143, 147, 165, 169-170, 180-181).

On March 25, the day following the frame department layoff, petitioner's president, Weiner, in a speech to the art department employees warned that he would not have a union in the plant and, as stated by employee Moore, emphasized his threat by asserting that he was "trying to keep us girls working and holding our jobs; but if we was going to act like that by him, he'd disband the fourth floor altogether" (B. A. 36-39, 75, 77; 120, 122, 129, 135, 153, 183, 203). He added that he had a new plant in Arlington, Kentucky, that he had moved the frame department down there, and that he would move the whole plant down there before he would have a Union (B. A. 36-39, 75, 77; 114-115, 122, 129, 135, 139, 179, 200-201, 203).

B. The discriminatory layoffs

1. *The discriminatory layoff of employees in the frame department*

On the morning of March 24, following Superintendent Weiss' earlier threat that, "We know who is in the Union and they will get theirs" (*supra*, p. 5), Weiss informed the employees in the frame department, where the Union's strength was concentrated, that petitioner was laying off all the employees in that department (B. A. 45, 76; 149, 163, 167), 173-174, 175). Weiss also advised the employees that the lay-off was due to a shortage of wire, that the layoff would be of short duration, and that they would be called back as soon as an expected shipment of wire arrived from New York (B. A. 45, 47, 76; 149, 163, 167, 173, 175, 216). Although petitioner contended that the layoff was in accordance with a preconceived plan to move the entire plant to Kentucky, Weiss made no mention of this, nor were any of the employees given an opportunity to transfer with it (*ibid.*). Although there was sufficient wire on hand to complete the day's work, operations were terminated at a time when a large number of frames remained unfinished (B. A. 47, 53, 76; 149-150, 173-174).

On the next day, March 25, 1949, petitioner shipped the frame department equipment to its Kentucky plant (B. A. 52; 97, 219-220). Its other departments were not transferred, however, and, as of the time of the hearing in this case, petitioner's books still carried the frame department equip-

ment as part of its Chicago inventory (B. A. 220-221). Following the closing of the frame department, petitioner continued to purchase frames from other companies as it had always done, but by August or September of 1949, its purchases of frames were two or three times what they had been while it operated its own frame department (B. A. 51; 209, 214, 231, 311). In June 1949, petitioner purchased the wire plant of Sher Brothers in Chicago, and maintained that plant for the production of silk shades until December, when the equipment was moved to petitioner's Chicago plant and petitioner's frame department was reactivated (B. A. 51; 96, 210-211, 216). In January 1950, following the reopening of the frame department and after unfair labor practice charges had been filed with the Board, petitioner made a bona fide effort to communicate with all of the discharged frame department employees in order to offer them reinstatement (B. A. 51, 78-79; 10, 21, 216).

Upon the foregoing facts, the Board found (B. A. 76-77) that petitioner's layoff of employees in the frame department was dictated, not by economic circumstances, but by a desire to discourage union activity, and that petitioner thereby violated Section 8(a)(3) and (1) of the Act.

2. *The discriminatory layoff of the art department employees*

In March 1949, there were 65 people working in petitioner's art department, including two artists and two supervisors (B. A. 54; 103, 155, 240-242).

The work in this department for the most part was done by unskilled laborers, classified as sprayers, wipers, and tapers (B. A. 54; 103, 155, 183-184, 187-188, 221-222, 240-242). It was in this department and the frame department that, with few exceptions, all of the approximately fifty union members were concentrated, more than fifty percent of the art department employees having joined (B. A. 55; 103, 155, 193, 233-242, 255-300).

On April 1, 1949, after the frame department layoff and on the heels of Scholl's interrogation and President Weiner's anti-union speech (*supra*, pp. 5-7), petitioner laid off fourteen art department employees, of whom twelve were union members (B. A. 54-60, 77-78; 103, 155, 193, 240-242, 255-300). At the time of this layoff there were eight instances in which, contrary to petitioner's previously declared policy (B. A. 57; 153), senior employees were laid off while employees in the same job classification with less seniority were retained (B. A. 54-60, 77-78; 103, 155, 240-242).[5] Again, just two weeks later, petitioner laid off seven additional art department employees, five of whom were union members, while retaining eleven employees with less seniority (Appendix A).

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[5] For the convenience of the Court, we have included as Appendix A to this brief, a compilation of this and subsequent layoffs in the art department, showing, according to job classifications, the number of union and non-union employees laid off and the number of employees with less seniority retained. This compilation is based upon the employee list furnished by petitioner (B. A. 103, 155, 240-242) and the union application cards signed by the art department employees (B. A. 193, 256-260, 262-264, 267-269, 271-274, 276, 278-279, 281, 283-284, 286-295, 299-300).

On April 20, immediately after a second anti-union speech by President Weiner (B. A. 36, 37-38, 75; 111-112, 129-131, 146, 153, 162, 176, 179, 182-183), nineteen more art department employees were laid off (Appendix A). In so doing, petitioner retained sixteen employees with less seniority, while eliminating the last sixteen union members (B. A. 54-60, 77-78; 103, 155, 193, 240-242, 255-300, Appendix A).

At the time of the lay-off the employees were merely advised that it was occasioned by lack of work (B. A. 112, 118, 131, 144, 162, 176). Although business improved in July 1949 and several of the terminated union members sought reinstatement, petitioner hired numerous new employees in the art and other departents and refused and failed to reinstate all but three of the union members previously laid off (B. A. 58; 112, 120, 123, 130, 136, 138, 142, 144-145, 146, 147-148, 154-155, 160, 171, 172, 177, 184-186, 189, 202-203, 203-206, 212-214, 230-231, 243-254, 303-310).

Accordingly, from these facts the Board concluded (B. A. 77-78) that petitioner, in selecting employees in its art department for layoffs, disregarded its usual policy of seniority in order to discriminate against Union adherents and thereby violated Section 8(a)(3) and (1) of the Act.

II. The Board's Order

Insofar as here relevant the Board's order (B. A. 78-86) directed that petitioner, to the extent it had not already done so, offer reinstatement and

back pay to the discriminat
in the frame and art dep
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from legitimate economi
Board directed that petiti
criminatees in the art depa
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sary, all persons hired in
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discriminatees for whom n
were to be placed on a prefer
Board also noted that, in co
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F. W. Woolworth Co., 90 N
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LRB 289 (B. A. 66),
ons thereto, the Board
. A. 80).

III. The Decision of the Court Below

The court below, upon a de
the record, upheld the Board
169). Noting that the evide
conflicting, the court stated t
very fair study" of the evide
could only reject the Board's
puted points by "accepting

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nce was often sharply
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's findings on the dis-
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and disregarding that of the Board" (P. A. 158). The court also observed that "no issue is raised as to the validity of [the quarterly back pay] formula," and consequently approved the Board's use of that formula without discussing its merits (P. A. 156). The court expressly approved the Board's recognition that some of the art department discriminatees might not be eligible for reinstatement or back pay because, even if there were no discrimination, they might nevertheless have been permanently laid off for economic reasons, but held that the same situation prevailed in the frame department (P. A. 160-161). Consequently, the court modified the Board's order to provide for the same treatment as to reinstatement, back pay, and preferential hiring in both the frame and art departments that the Board had originally ordered only for the latter (P. A. 160-161, 172-173, cf. B. A. 78-81).

ARGUMENT

1. Petitioner's contention that the Board was required in the unfair labor practice proceeding to find that none of the employees whom it adjudged to be the subjects of discrimination would have been laid off either at that time or subsequently, had there been no discrimination, misconceives the nature of the unfair labor practice and is contrary to the uniform holdings of the Courts of Appeals. *National Labor Relations Board* v. *Carolina Mills, Inc.*, 190 F. 2d 675, 676 (C. A. 4); *F. W. Woolworth Co.* v. *National Labor Relations Board*, 121 F. 2d 658, 662-663 (C. A. 2); *National Labor Relations*

Board v. *Sandy Hill Iron & Brass Works*, 165 F. 2d 660, 662-663 (C. A. 2); *Montgomery Ward & Co.* v. *National Labor Relations Board*, 107 F. 2d 555, 557 (C.A. 7); *National Labor Relations Board* v. *Cowell Portland Cement Co.*, 148 F. 2d 237, 244 (C. A. 9), certiorari denied, 326 U. S. 735; see also, *National Labor Relations Board* v. *Bird Machine Co.*, 174 F. 2d 404, 405-406 (C. A. 1); *Home Beneficial Life Insurance Co.* v. *National Labor Relations Board*, 172 F. 2d 62, 63 (C. A. 4); *National Labor Relations Board* v. *New York Merchandise Co.*, 134 F. 2d 949 (C. A. 2).

The Board found, as to the frame department, that petitioner laid off all the employees discriminatorily. Even assuming that all would have been laid off at some subsequent time, for economic reasons, that circumstance could not eradicate the unfair labor practice; it would serve merely to diminish the back pay to which these employees would be entitled. Similarly, the Board found, as to the art department, that petitioner discriminated against all the union employees who were laid off by selecting them for lay-off because of their union activities rather than in order of their seniority. That some of them would have been reached if petitioner had followed its seniority policy in this instance does not establish that they were not victims of discrimination, but merely that they are not entitled to back pay. Consequently, in leaving to compliance proceedings the question of which of these employees are not entitled to back pay, the decree in the instant case does not differ from those which,

as petitioner concedes (Pet. 15), properly leave to post-decree proceedings such matters as "the amount of back pay due to specific employees and the number of vacancies for reinstatement purposes."

Petitioner's claim that to leave this issue to compliance proceedings is to shift the burden of proving unfair labor practices from the Board to the employer is equally in error. All that is left to subsequent proceedings is whether any of the employees discriminated against should not receive back pay and reinstatement. The burden of proving that an employee who has been discriminated against is nevertheless not entitled to the normal remedy of reinstatement and back pay is always on the employer, not the Board. Cf. *E. Anthony & Sons* v. *National Labor Relations Board*, 163 F. 2d 22, 27 (C. A. D. C.), certiorari denied, 332 U. S. 773; *National Labor Relations Board* v. *J. G. Boswell Co.*, 136 F. 2d 585, 597 (C. A. 9); *National Labor Relations Board* v. *Remington Rand, Inc.*, 94 F. 2d 862, 872 (C. A. 2), certiorari denied, 304 U. S. 576, 585; see also *Interstate Circuit* v. *United States*, 306 U. S. 208, 225-226. No conflict of decisions is claimed and none exists.

2. The careful opinion of the court below leaves no room for doubt that it followed and applied the appropriate standard of review enunciated in *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U. S. 474. The court's statement, criticized by petitioner (pp. 16-17), that "to reject the Board's findings from the conflicting evidence

it would have to be on the basis of accepting all the Deena evidence and disregarding that of the Board," reflects not a misconception of the *Universal Camera* rule but rather the insubstantiality of petitioner's assertion that the evidence considered as a whole does not support the findings of the Board. The court's appraisal of the evidence, fully supported by the record (see pp. 4-11, *supra*), should not be subjected to further review. *National Labor Relations Board* v. *Pittsburgh Steamship Co.*, 340 U. S. 498, 502-503; *General Pictures Co.* v. *Electric Co.*, 304 U. S. 175, 178.

3. Petitioner's blanket attack upon the decree (Pet., pp. 22-23) raises no issues warranting review. Although not specifically stated in the decree, it is well settled that it is open to the employer in compliance proceedings to reduce the amount of back pay by establishing that the employees might have been legitimately laid off at some time after their discriminatory lay-off, or that they made no reasonable effort to find other employment. See *Salmon & Cowin, Inc.* v. *National Labor Relations Board*, 148 F. 2d 941, 942-943 (C. A. 5); *Harvest Queen Mill & Elevator Co.*, 90 NLRB 320. Petitioner's challenge to the requirement that it place on a preferential hiring list the discriminatorily laid off employees who would have been laid off even if there were no discrimination is without substance. Uniformly upheld in the cases cited, *supra*, pp. 13-14, the use of a

preferential list in such circumstances is aptly designed to redress the unfair labor practices, and as such is a valid exercise of the Board's power "to determine how the effect of prior unfair labor practices may be expunged." *International Association of Machinists* v. *National Labor Relations Board*, 311 U. S. 72, 82. Finally, petitioner is precluded from challenging the Board's back pay formula by its failure to raise that issue either before the Board or before the court below. See pp. 12-13, *supra*. *Marshall Field & Co.* v. *National Labor Relations Board*, 318 U. S. 253, 255-256; *National Labor Relations Board* v. *Cheney California Lumber Co.*, 327 U. S. 385, 388-389; *McCullough* v. *Kammerer Corp.*, 323 U. S. 327.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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JULY, 1952.

APPENDIX A[6]

ANALYSIS OF ART DEPARTMENT LAYOFFS

Date of layoff	Laid off			Employees with less seniority retained
	Union	Nonunion	Total	
April 1, 1949:				
Sprayers	2	.....	2	1
Tapers	7	.....	7	12
Wipers	3	2	5	1
Totals	12	2	14	14
April 15, 1949:				
Sprayers	1	.....	1	3
Tapers	1	2	3	5
Wipers	3	.....	3	3
Totals	5	2	7	11
April 20, 1949:				
Sprayers	4	.....	4	2
Tapers	5	3	8	10
Wipers	7	.....	7	4
Totals	16	3	19	16

APPENDIX B

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Supp. IV, 141 *et seq.*) are as follows:

* * * * *

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection * * *.

[6] See *supra*, p. 10, n. 5.

UNFAIR LABOR PRACTICES

Sec. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *.

* * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

Sec. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise * * *.

* * * * *

(c) The testimony taken by such member, agent, or agency of the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist

from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act * * *.

(e) The Board shall have power to petition any circuit court of appeals of the United States * * * within any circuit * * * wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

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